No. 72-1634

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In The Supreme Court of The United States

OCTOBER TERM, 1973

DESERT OUTDOOR ADVERTISING, INC.; ARTHUR SHIPKEY and BETTY SHIPKEY,
Petitioners,

vs.

CITY OF ESCONDIDO, a political subdivision of the State of California,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF ESCONDIDO

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No. 72-1634

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

DESERT OUTDOOR ADVERTISING, INC.; ARTHUR SHIPKEY and BETTY SHIPKEY,

Petitioners,

vs.

CITY OF ESCONDIDO, a political subdivision of the State of California,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Respondent prays that a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of California, entered February 6, 1973, be denied.

OPINIONS BELOW

The opinion of the California Supreme Court appears in Appendix A. The opinion of the Court of Appeal appears in Appendix B. The Memorandum Decision of the Superior Court of the State of California, In and For the County of San Diego, appears in Appendix C.

JURISDICTION

The decision of the Superior Court of San Diego County, California granting affirmative injunctive enforcement of a city ordinance was entered February 5, 1971. Said decision was reversed on Appeal by the Court of Appeal of California, Fourth Appellate District, Division One on June 21, 1972, and a Petition for Rehearing to that court was denied on July 7, 1972. A Petition for Hearing to the Supreme Court of California was granted September 11, 1972, and said Supreme Court entered a decision affirming the decision of the Superior Court on February 6, 1973. A Petition for Rehearing to the Supreme Court of California was denied on March 8, 1973, and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is sought to be invoked by Petitioners under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) WHETHER PETITIONERS HAVE BEEN DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND HAVE BEEN DENIED THE EQUAL PROTECTION OF LAW WHEN THEY ASSERT THREE GROUNDS FOR REVERSAL OF A TRIAL COURT'S JUDGMENT AGAINST THEM, THE COURT OF APPEAL REVERSES THE JUDGMENT ON TWO OF THOSE GROUNDS, AND THE STATE SUPREME COURT REVERSES THE APPELLATE COURT'S DECISION AND AFFIRMS THE TRIAL COURT'S JUDGMENT.

(2) WHETHER PETITIONERS HAVE BEEN DEPRIVED OF THE EQUAL PROTECTION OF THE LAW BY A CITY ZONING ORDINANCE THAT REQUIRES THE REMOVAL OF PETITIONER'S OUTDOOR ADVERTISING SIGNBOARD.

CONSTITUTIONAL PROVISIONS INVOLVED

The "due process" and "equal protection" clauses of the 14th Amendment to the Constitution of the United States are sought to be invoked by petitioners:

> " . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
> U. S. Constitution, 14th Amendment, Section 1.

STATEMENT OF THE CASE

The Respondent, CITY OF ESCONDIDO, is a California general law city. Petitioner DESERT OUTDOOR ADVERTISING, INC., is a California corporation created in 1954 whose primary business is and has been the ownership, erection and maintenance of outdoor advertising signboards in the County of San Diego and in other counties in Southern California. In May 1963, Respondent purchased for $18,500.00 a group of sixty (60) outdoor advertising signboards, one of which was the signboard in question.

At the time of purchase and at all times thereafter, the signboard was located within the city limits of Escondido, on property owned by Petitioners ARTHUR and BETTY SHIPKEY. The sign is of wood construction, measures 9 x 20 feet and has surfaces facing to the north and to the south which are perpendicular to U. S. Highway 395. The east end of the sign is approximately 60 feet to the east of the paved portion of U. S. Highway 395 and is approximately 300 - 400 feet south of Felicita Avenue. U. S. Highway 395 at all times from July 23, 1965, traversed the entire City of Escondido in a north-south direction, and is and has been a divided arterial highway having partial control of access and grade separations.

At no time since September 1966 have there been any

improvements observed upon the property other than the signboard in question. At no time from the effective date of Ordinance No. 1018 was Petitioner's signboard used to advertise for sale the real property upon which the sign was situated, or to designate the owners of such property. At no time from the date of purchase of said sign in May 1963 was it ever used to advertise any business conducted upon the real property upon which it was situated, or to advertise any goods manufactured on such real property. Indeed, municipal ordinances not involved herein prohibited such uses of the billboard. The signboard, at all times from and including July 23, 1965, was so situated as to be viewed primarily by the persons traveling upon U. S. Highway 395. Between July 23, 1965 and March 1970, there appeared on the signboard advertisements for "Brookside Winery," "Gulf Oil Company" and "Crow Realty."

Between March 7, 1970 and the date of trial, both faces of the signboard were painted over with white paint, leaving the signboard blank. At the time of trial, Petitioner was negotiating with a commercial business for the placing of advertising on the sign. Such business was not located or conducted on the same real property as that on which the sign was located.

On June 23, 1965, the City of Escondido adopted Ordinance No. 1018, entitled "An Ordinance of the City of Escondido Amending Division 9, Chapter 90, of the Escondido Municipal Code by Adding Thereto Article 904, entitled 'Freeway Sign Control' consisting of Sections 9041 through 9050." A copy of the Ordinance appears in Appendix D. After the expiration of a three-year grace period, Ordinance 1018 declared to be a nuisance and prohibited the placement or maintenance of advertising displays on property adjacent to a sign-controlled freeway. The ordinance was duly published and it became effective on July 23, 1965.

Ordinance No. 1018 was not enacted nor was it intended to be enacted as a zoning measure. The procedural provisions

of the Planning & Zoning Act (Former California Government Code Sections 65650 - 65654) in effect on July 23, 1965, were not followed. The Ordinance was enacted pursuant to and in accordance with the general police powers of the City of Escondido.

On June 9, 1969, Respondent filed a complaint for a mandatory and prohibitory injunction to enforce Ordinance 1018. The complaint alleged that one signboard owned by Petitioner DESERT OUTDOOR ADVERTISING, INC., on property owned by Petitioners ARTHUR and BETTY SHIPKEY, was in violation of the ordinance and should be removed and, further, that Petitioners be enjoined from placing, maintaining or using any outdoor advertising signs or structures on property in the City of Escondido adjacent to a sign-controlled freeway, when the placing, maintenance, or use of such signs or structures is in violation of City of Escondido Ordinance No. 1018. Petitioners answered, claiming all defenses upon which Petitioners now rely. Said defenses were and are that (1) the ordinance was invalid as an unreasonable exercise of the city's police power, in that it could validly be enacted only as a zoning ordinance in accordance with the Government Code; (2) removal of the signboard prior to its full amortization would constitute a taking of property without compensation, in violation of State and Federal statutes and constitutions; and (3) the judgment was invalid insofar as it required the removal of a signboard which was not in violation of the ordinance at the time of trial (the board was blank), and which might possibly be used for the purposes permitted by the ordinance as an "on-site" signboard.

Trial was held on December 16, 17 and 18, 1970. Judgment was entered for Respondent, upholding the validity of Ordinance 1018 against all attacks and all defenses. The Memorandum Decision of the trial court was complete, comprehensive and determinative of all issues. The Judgment required that Petitioners remove the signboard within ninety (90) days.

Petitioners appealed to the Court of Appeal on the three grounds stated above. All defenses raised by Petitioners were thoroughly briefed and vigorously argued. On June 21, 1972, the Court of Appeal reversed the trial court's decision basing its reversal upon Petitioners' first and third grounds. It was held that Ordinance 1018 was invalid as not having been enacted in conformity with the requirements of the California Government Code and it was further observed that, because the signboard was blank at the time of trial, "it could have been used for purposes permitted by the ordinance." (See page 8 of the opinion of the Court of Appeal.)

Respondent petitioned for and was granted a hearing before the California Supreme Court. Again, the issues were thoroughly briefed, particularly the first and third grounds raised by Petitioners and described above. Additionally, the comprehensive briefs submitted by both parties to the Court of Appeal were forwarded to the Supreme Court for its review and consideration. Argument was heard on December 7, 1972, which argument was also comprehensive of all the issues raised.

On February 6, 1973 the California Supreme Court reversed the decision of the Court of Appeal and declared that *the Judgment of the trial court was affirmed.*

Petitioners filed with the State Supreme Court a Petition for Rehearing, which Petition was denied on March 8, 1973.

REASONS FOR DENYING THE WRIT

I

PETITIONERS HAVE SUFFERED NO DEPRIVATION OF CONSTITUTIONAL RIGHT BY VIRTUE OF THE APPELLATE PROCEDURES FOLLOWED HEREIN, NOR DO PETITIONERS CITE AUTHORITY FOR REVIEW BY THIS COURT

Petitioners have not been denied due process, procedural or otherwise, as a consequence of the appellate steps followed by the courts below. Further, the circumstances relied upon by Petitioners are neither novel nor unique, as alleged.

The January 5, 1971 Memorandum Decision of the trial court precisely covered each defense raised by Petitioners, which defenses continued throughout this appellate process to be the bases for Petitioner's appeal. All issues were briefed and argued before the State Court of Appeal and the same briefs were reviewed by the State Supreme Court.

The Court of Appeal based its reversal of the trial court ruling upon *two* of Petitioners' three grounds for appeal, not merely one ground as urged by Petitioners. Petitioners' first and third grounds for appeal were specifically referred to and relied upon by the Court of Appeals. The second ground, that a sufficient period of time for the amortization of the signboard structure was not allowed, was never alluded to by the Court of Appeal, nor did the Supreme Court specifically cite such point in its opinion. The reason for this selective reliance is clear.

The trial Judge made pointed reference to the fact that Petitioners offered no persuasive testimony on the issue of amortization. It was determined that Petitioners had the burden of proving the three year amortization period to be unreasonable and that such burden was simply not carried.

The California Supreme Court could not, however, have failed to consider the two arguments upon which the Court of

of Appeal based its decision. In reversing said Court's decision, the Supreme Court, of necessity, was called upon to review, and did review, the merit of the lower court opinion. Petitioners' argument herein implied that the California Supreme Court reversed the Court of Appeal decision on one ground, while it might have upheld such decision on another. The argument is unsupported by the facts.

The entire record, including argument on all issues raised, was before the Supreme Court. Said Court's affirmance of the trial court's comprehensive judgment was an extremely precise and concise means of recognizing and resolving each and every one of the issues raised. Indeed, the Supreme Court is compelled to do no more. If, however, the Court chooses to clarify its decision with an explanation of points of law worthy of discussion, it does not, thereby, become bound to provide a detailed critique of each argument raised by the litigants. If the Court is selective in discussing only meritorious issues, a petitioner is not denied Constitutional protections merely because the Court declines to exhaustively explain why the remaining issues raised are without merit. Petitioners herein have been provided a decision on the merits; they have no Constitutional right to an explanation for the rejection of their nonmeritorious claims.

While urging that Petitioners' factual bases for this Petition are nonexistent, we must also point out that Petitioners have failed to cite to this Court authority supportive of granting the Petition sought.

Petitioners cite the case of *National Union of Marine Cooks v. Arnold*, 348 U.S. 37 (1954), 99 L.Ed.2d 46, which case, at best, fails to sustain Petitioners' argument and, at worst, is the antithesis of such argument. If the case has any application to the matter at hand, it would be authority for denying the Petition requested herein.

Similarly, the case of *Cole v. Arkansas*, 333 U.S. 196 (1947), 92 L.Ed.2d 644, is of dubious value to Petitioners. Perhaps

recognition of this fact led Petitioners to omit key portions of their quote taken from said case, thereby altering its meaning. Three sentences have been deleted from such quote, which are essential to a correct interpretation of the case.

In the *Cole* matter, an Arkansas trial court convicted the defendant of a felony under one particular law. On appeal, the conviction was upheld by the State Supreme Court, but such affirmance was based upon an altogether different law. In reversing the State Court decision, the United States Supreme Court concluded that the conviction must have been affirmed on the basis of the trial which the petitioner was afforded.

As was stated in *Cole*, "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was *tried* and as the issues were determined in the *trial court*." (P. 202, emphasis added) There is absolutely no suggestion in this record that the judgment against Petitioners was based upon issues not raised during the trial. In fact, exactly the opposite is true. The California Supreme Court, upon a review of the entire case, affirmed the trial court's judgment. Such affirmance was based solely upon issues thoroughly litigated during trial. There is absolutely no basis for Petitioners' allegation that they have not been afforded the process of law that the State of California has provided for all litigants.

II

THE ADOPTION OF ORDINANCE 1018 WAS A PROPER EXERCISE OF THE POLICE POWER VESTED IN RESPONDENT

In an early and celebrated discussion of the police power, the Honorable Justice Oliver Wendell Holmes stated that, "It may be said in a general way that the police power extends to all the great public needs . . . It may be put forth in aid of what

is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Heiskell*, 219 U.S. 104 (1911), 55 L.Ed. 112, at page 116.

After a lapse of forty-three years, the United States Supreme Court still defined the police power in the broadest possible terms:

> " . . . We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the p product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition . . . " *Berman v. Parker*, 348 U.S. 26 (1954), 75 S.Ct. 98, 102.

Taking their cue from the high Court, the definition of the police power by State Supreme Courts is typified by the language found in *Miller v. Board of Public Works*, (1925) 195 Cal. 477, 484.

> "The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonable and arbitrarily invoked and applied. (*Hadacheck v. Sebastian*, 239 U.S. 394 [Ann. Cas. 1917B, 927, 60 L.Ed. 348, 36 Sup. Ct. Rep. 143]; *District of Columbia v. Brooke*, 214 U.S. 138, 149 [53 L.Ed. 941, 29 Sup. Ct. Rep. 560, see, also, Rose's U.S. Notes].)

The principal limitations of the police power are those imposed by the Fourteenth Amendment of the U. S. Constitution and similar provisions in State Constitutions. When the police

power is exercised, the accusation of "arbitrary and unreasonable legislation" is bound to be leveled, as in this case. The question becomes, not whether Ordinance 1018 adversely affects Petitioners, which Respondent readily concedes, but whether the local enactment is a lawful exercise of the police power, being neither arbitrary nor unreasonable. This determination can only be made upon a review of the facts attendant to each case.

As stated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), 67 L.Ed. 322, the question depends upon the particular facts in each case. In reviewing such facts, we are to lend the greatest possible weight to the judgment of the local legislative body. (at page 413)

In the instant case, Ordinance 1018 was enacted by a City Council concerned with narrowly defining one particular nuisance; namely, the proliferation of billboards along the main thoroughfares of its city. Upon defining the nuisance, the Council applied the controls thereto with an even hand. Each and every pursuit falling within the categorical nuisance is and has been treated precisely the same. Within the carefully and reasonably defined category, the limitations and prohibitions contained in Ordinance 1018 have been applied without discrimination.

Because the ordinance results in a diminution of property rights or limits a business pursuit does not render it invalid. Government could hardly survive if, to some extent, values affected by the sound control of property use could not be diminished without reference to payment. *Pennsylvania Coal Co. v. Mahon, supra*, page 413. The impairment or restriction of property use is a lawful by-product of the exercise of the police power. *Nebbia v. New York*, 291 U.S. 502 (1933); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

A comparison of the applicable laws to the facts herein compels the conclusion that Ordinance 1018 was and is a lawful exercise of the police power vested in the City of Escondido.

Further, this conclusion remains unchanged whether such power was exercised by the adoption of zoning controls or by the prohibition of the continued maintenance of a nuisance.

Zoning and nuisance provisions are two different gloves over the hand of the police power. They are merely different vehicles for the exercise of that power. Petitioners have treated the use of the zoning glove as a touchstone of propriety; as the condition precedent to the exercise of the power. The argument is specious. Respondent has steadfastly maintained that its preferred use of the nuisance glove in no way diminishes or compromises its right and authority to apply the hand of its police power. As stated in its Petition for Hearing before the California Supreme Court, Respondent asserts that Petitioners' argument would require that in each instance where a city, in the interest of maintaining the public health, safety and welfare, sought to apply a control upon a land or property use, such control could only be enacted as a zoning measure. The theory is novel. More important, it is unsupported by law.

Respondent urges that the determination of the trial court, as sustained by the State Supreme Court, that Ordinance 1018 is a proper exercise of Respondent's police power, be permitted by this Court to stand.

CONCLUSION

Respondent urges that certiorari be denied.

Respectfully submitted,

CITY OF ESCONDIDO

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APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
IN BANK

CITY OF ESCONDIDO, *Plaintiff and Respondent,* vs. DESERT OUTDOOR ADVERTISING, INC., *Defendants and Appellants.*	L.A. 30062 Super. Ct. 312192

In this case we are asked to decide whether, under applicable law as it existed in 1965, a general law city could regulate the placement of signs and billboards along freeways without the necessity of complying with the law governing the adoption of zoning ordinances.

City of Escondido ("City"), a general law city, asserts that Government Code section 38774[1] authorized cities to regulate the placement of such signs and billboards by the enactment of

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[1]Section 38774, contained in an article of the Government Code pertaining to "Nuisances," provides that "The legislative body [of a city] may:

"(a) Regulate the exhibition, posting, or carrying of banners, placards, posters, cards, pictures, signs, or advertisements in or on the street, or on or upon buildings, fences, billboards, or other structures; or on or upon any pole in any sidewalk, alley, street, lane, court, park, or other public place.

"(b) Regulate the suspension of banners, flags, signs, advertisements, posters, pictures, or cards across or over any sidewalk, alley, street, lane, court, park, or other public place, or such suspension from fences, poles, houses, or other structures."

Other sections of the article permit a city to declare by ordinance what constitutes a nuisance (§38771), to provide for the summary abatement of any nuisance (§38773), and to "prohibit and prevent encroachments upon or obstruction in or to any sidewalks, street, alley, lane, court, park, or other public place and provide for the removal of such encroachment or obstruction." (§38775.)

an ordinance adopted in the manner prescribed for the adoption of ordinance generally.[2] Defendants, an outdoor advertising company and property owners on whose land the billboard at issue is located, assert instead that former Government Code section 65800[3], in effect when City's ordinance was enacted, required that regulation of the placement of signs and billboards along freeways be done only by the enactment of a zoning ordinance adopted in the manner required by law for the regulation of the uses to which private property may be put. *We have concluded that City's ordinance was authorized by the provisions*

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[2]See Government Code sections 36931 et seq.

[3]Former section 65800 provided that "Pursuant to the provisions of this chapter ["zoning regulations], the legislative body of any county or city by ordinance may:

"(a) Regulate the use of buildings, structures, and land as between agriculture, industry, business, residence and other purposes.

"(b) Regulate location, height, bulk, number of stories, and size of buildings and structures; the sizes of yards, courts and other open spaces; the percentage of a lot which may be occupied by a building or structure. . . ."

In 1965, following the enactment of City's ordinance, section 65850 was adopted, with substantially identical language as former section 65800, but including as new subdivision (b) the words "Regulate signs and billboards." Therefore, the new section expressly includes signs and billboards within the type of structures which could be regulated by a zoning ordinance.

Thereafter, in 1967, section 5288.7 was added to the Business and Professions Code as part of the so-called "Outdoor Advertising Act." That section, now renumbered as section 5230, permits cities and counties to enact ordinances "including, but not limited to, land use or zoning ordinances, imposing restrictions on advertising displays [which would include signs and structures, under §5202] adjacent to any street, road, or highway equal to or greater than those imposed by this chapter." Therefore, in spite of the expansion of the Planning and Zoning Act to include regulation of signs and billboards by zoning laws [Gov. Code, §65850, subd. (b)], cities appear to retain, under section 5230 of the Business and Professions Code, authority to regulate such matters by general ordinance. Note, however, that section 5230 and other provisions of the Outdoor Advertising Act apply only to a limited extent to advertising displays in incorporated areas. (Bus. & Prof. Code, §5271.)

of section 38774, and that compliance with zoning law procedures was therefore unnecessary.

City's ordinance was enacted on June 23, 1965 and took effect on July 23, 1965. That ordinance, entitled "Freeway Sign Control," prohibits the placing or maintaining of advertising signs, structures, or displays on property adjacent to freeways and declares that the placement or maintenance of advertising displays on such property (following a three-year grace period) is a nuisance.[4] City admits that the ordinance was not enacted in accordance with the procedural requirements for the enactment of zoning ordinances but asserts that it was properly adopted under the procedures for the enactment of general city ordinances under City's police power.[5]

The trial court found that the signboard violated the ordinance and ordered that it be removed within 90 days. Defendants have appealed the adverse judgment. In essence, defendants contend that Government Code section 38774 does not authorize a city to regulate the erection, maintenance or location of signboards but only the exhibition and posting of advertisements on such signboards. In other words, defendants would restrict the application of section 38774 to the placement of advertisements on signboards, and not to the placement of signboard

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[4]City's ordinance also exempts from its provisions any advertising display which offers for sale or lease the property upon which the display stands, which designates the name of the property owner or identifies the property, or which advertises the business conducted on the property.

[5]The constitutional authority of a general law city such as plaintiff is limited to the enactment of ordinances "not in conflict with general laws." (Former art. XI, §11, now art. XI, §7.) One such "general law" is the so-called "Planning and Zoning Law" (Gov Code, §65000 et seq.) which, in 1965, required a public hearing before the planning commission, commission approval by at least a two-thirds vote, and city council adoption following an additional public hearing, in order to enact a zoning measure. (See former Gov. Code, § §65650-65654, 65803, stats. 1953, ch. 1355, pp. 2924, 2927.) City contends that its ordinance was not enacted as a zoning measure under the authority of the Planning and Zoning Act, but as a police power measure expressly authorized by Government Code section 38774.

structures on property adjacent to public streets. *We believe, however, that defendants' interpretation of section 38774 is too narrow, and that the section would authorize the regulation of signboard structures which, by reason of their proximity to a freeway, have been declared to be nuisances.*

Section 38774 grants cities the authority to " . . . Regulate the exhibition [and] posting . . . of . . . signs, or advertisements in or on the street, or on or upon . . . billboards, or other structures . . . " *The word "signs" reasonably may be construed to include the signboard structures themselves, given the evident purpose underlying section 38774 to permit municipal regulation of potential nuisances* arising from the proximity of various types of outdoor advertising to streets, buildings and other public places.

As we have seen (fn. 1, *ante*), section 38774 is one of a group of sections which empower cities to regulate nuisances. Under section 38771, "By ordinance the city legislative body may declare what constitutes a nuisance," and under section 38773, a city may by ordinance provide for the abatement of a nuisance. Section 38774 specifies a particular type of nuisance subject to municipal control, and authorizes cities to "regulate" the exhibition and posting of signs and advertisements.

On the other hand, former Government Code section 65800, subdivision (b), on which defendants rely, made no reference to advertising signs and billboards, but merely authorized the legislative body to adopt ordinances regulating the location of buildings and "structures." That section constituted the authority for cities to enact comprehensive zoning ordinances generally, in accordance with specified procedures. (See fn. 5, *ante*.) It is a fundamental rule of statutory construction that when a general statute appears to conflict with a special act, the latter will be considered an exception to the former. (People v. Gilbert, 1 Cal.3d 475, 479-480: see 45 Cal.Jur.2d, Statutes, §120, and cases cited.) Accordingly, we deem section 38774 an exception to the general provisions of former section 65800, and we conclude that City's ordinance was not required to be enacted in accordance with zoning ordinance procedures.

We do not view our interpretation of section 38774 as

vesting a city with unreasonably broad police powers in this area. Although it is generally held that a municipality's power to regulate lawful businesses may not be used to prohibit them entirely (see Parker v. Colburn, 196 Cal. 169, 176; 3 Witkin, Summary of California Law, Constitutional Law, § 160, p. 1971; 11 Cal. Jur.2d, Constitutional Law, § 149, p. 529, and fn. 14), that rule does not apply to a business whose operation constitutes a nuisance, inimical to the public welfare (see Sunset Amusement Co. v. Board of Police Commissioners, 7 Cal.3d 64, 80; Jones v. City of Los Angeles, 211 Cal. 304, 315). *It should be remembered that, in the instant case, City's ordinance declares advertising adjacent to its freeways to be a nuisance, and that the reach of section 38774 seemingly extends no further than to permit regulation of such nuisances.* (See fn. 1, *ante*.)

Moreover, City's ordinance does not purport to prohibit all signs and advertisements but only to regulate their location so that they do not constitute nuisances and for the obvious purposes of promoting highway safety as well as enhancing community aesthetic values. The case of Varney & Green v. Williams, 155 Cal. 318, is readily distinguishable. There the court held invalid an ordinance which forbade all advertising billboards within city limits. (See also Metromedia, Inc. v. City of Pasadena, 216 Cal.App.2d 270, 273-274.)

We emphasize that ordinarily municipalities must follow statutory or charter zoning procedures strictly whenever they propose a substantial interference with land use, for such procedures are constitutionally mandated to insure that private property owners receive due process of law. (See Scott v. City of Indian Wells, 6 Cal.3d 541, 549; Hurst v. City of Burlingame, 207 Cal. 134, 141; 55 Cal.Jur.2d, Zoning, § 109; McQuillin, Municipal Corporation, § § 25.40, 25.46.) In the instant case, however, defendants have failed to establish any such substantial interference. In plaintiff's view, section 38774 would permit the exclusion of signboards adjacent to freeways, whereas, under defendants' interpretation, only the advertisements themselves could be prohibited. Since the practical effect (in terms of restricted land use) would be the same, it is evident that we must scrutinize not the method but the *extent* of City's regulation in

order to determine whether zoning procedures should have been followed. (See McQuillin, *supra*, § 25.53.) *Whether a particular interference with, or restriction upon, land use is a substantial one, requiring compliance with applicable zoning procedures, can be determined only by examining the facts of each particular case.* (*Id.*, § 25.46.) In the instant case, City's ordinance is narrowly limited to advertising displays adjacent to freeways and designated to be viewed primarily by freeway travelers; reasonable exemptions are made for advertisements affecting the property upon which the signboards stand. We conclude that the restrictions upon land use resulting from City's ordinance were minimal, and that accordingly that ordinance was properly enacted as a general police measure under section 38774 of the Government Code[6].

The judgment is affirmed.

BURKE, J.

WE CONCUR:

SULLIVAN (Acting C.J.)
McCOMB (J.)
TOBRINER (J.)
MOSK (J.)
SCHAUER (J.*)

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

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[6]Defendants have also argued that the Outdoor Advertising Act (Bus. & Prof. Code, §5200 et seq.), in effect when City's ordinance was enacted, preempted the regulation of advertising displays, including structures maintained for outdoor advertising purposes (See Bus. & Prof. Code, § §5204, 5205), except by local ordinances enacted in accordance with the Planning and Zoning Law (former Gov. Code, §65000 et seq.). (See former Bus. & Prof. Code, §5227.) Yet former section 5226 of the Act specifically excluded from the Act's operation territory located within incorporated cities and towns, and former section 5227 pertained to *counties*, not cities. Accordingly, the Outdoor Advertising Act did not restrict City's authority to adopt Ordinance No. 1018.

APPENDIX B

APPENDIX B

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

CITY OF ESCONDIDO, *Plaintiff and Respondent,* vs. DESERT OUTDOOR ADVERTISING, INC., et al., *Defendants and Appellants*	4 Civ. No. 11052 (Sup. Ct. No. 312192) OPINION

APPEAL from a judgment of the Superior Court of San Diego County. Roscoe S. Wilkey, Judge. Reversed.

Swing, Scharnikow, Lewis & Kroll and David K. Kroll, for Defendants and Appellants.

Walker & Gann and Roy H. Gann, for Plaintiff and Respondent.

Defendants appeal from a judgment in an action instituted by plaintiff declaring a signboard on property adjoining an arterial divided highway in the City of Escondido violates Ordinance No. 1018 of that city, adopted June 23, 1965; and ordering removal thereof within 90 days.

Defendant Desert Outdoor Advertising, Inc. is the owner of the signboard, purchased in May, 1963, and defendants Arthur Shipkey and Betty Shipkey, are owners of the land upon which the signboard has been located since that date.

Initially defendants contend Ordinance 1018 is invalid because it was not enacted in the manner prescribed by the Planning Law, i.e., former Government Code sections 65000 et seq.,

governing the enactment of zoning ordinances, upon which the authority of the city to regulate signboards was predicated.[1]

Plaintiff concedes the ordinance was not enacted in the manner prescribed by the Planning Law but contends it is valid as an exercise of the police power conferred upon municipalities by former section 11, article 11 of the California Constitution and sections 37100, 38774 and 38771 of the Government Code, which may be exercised by enactment of an ordinance in the manner prescribed for the adoption of ordinances generally.

Defendants premise their contention on the claim the Outdoor Advertising Act (Bus. & Prof. Code §§5200 et seq.), in effect when the ordinance was enacted, preempted the regulation of advertising displays, which includes a structure maintained for outdoor advertising purposes (Bus. & Prof. Code §§5204, 5205), except by local ordinance enacted pursuant to the Planning Law, i.e., former Government Code sections 65000 et seq., citing former Business and Professions Code section 5227 [Stats. 1961, ch. 440, p. 1513] and the decision in *County of Santa Barbara v. Purcell, Inc.*, 251 Cal.App.2d 169, as determinative of the issue. Reliance upon former section 5227 and the cited case is misplaced; section 5227 excluded from its preemption provisions county zoning regulations affecting the placing of advertising displays enacted in accordance with the provisions of the Planning Law; the decision in *County of Santa Barbara v. Purcell, Inc., supra*, 251 Cal.App.2d 169, involved a county zoning ordinance, not a city ordinance, regulating signboards; and the provisions of the Outdoor Advertising Act, in effect when Ordinance 1018 was enacted, did not apply to advertising displays within the view of highways located in "incorporated cities and towns" (former Bus. & Prof. Code §5226 [stats. 1939,

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Footnote 1: Defendants refer to Government Code sections 65000 et seq. enacted in 1965, which became effective September 17, 1965, and were not in effect on June 23, 1965, when Ordinance 1018 was enacted. Applicable Government Code sections in effect on the latter date were enacted in 1953 [stats. 1953, ch. 1355, pp. 2913 et seq.]; in 1956 [stats. 1956, ch. 33, pp. 359 et seq.]; in 1959 [stats. 1959, ch. 745, p. 2735]; and in 1961 [stats. 1961, ch. 1111, p. 2836].

ch. 32, p. 334]), thus excluding from the preemption declared by section 5227, the regulation of such advertising displays within cities.

We conclude the provisions of the Outdoor Advertising Act in effect in 1965 did not proscribe enactment of an ordinance by a city, in the exercise of its police power, regulating signboards. However, this conclusion is not determinative of the contention attacking the validity of Ordinance 1018 upon the ground it is a zoning ordinance not adopted in the manner prescribed by the Planning Law.

The judgment at bench declares:

> " . . . the advertising signboard owned by defendant, Desert Outdoor Advertising, Inc., situated on real property owned by defendants, Arthur H. Shipkey and Betty Shipkey, is in violation of Ordinance No. 1018 of the City of Escondido, California;"

and orders defendants to remove the advertising signboard within 90 days.

Uncontradicted and unimpeached evidence establishes, at the time of the trial there was no advertising material on the signboard in question; the face thereof had been painted white; and it was blank.

The constitutionally conferred authority of a city to exercise the police power by ordinance and regulation is limited to that "not in conflict with general laws." (Former Art. 11, § 11, Calif. Const.) The power thus conferred includes the power to regulate outdoor advertising displays by ordinance. (*County of Santa Barbara v. Purcell, Inc., supra,* 251 Cal.App.2d 169, 175.) However, the issue at bench is the manner of the exercise of that power. Defendants contend it may be exercised only by enactment of a zoning ordinance, whereas plaintiff contends its exercise is not so limited but may be exercised by an enactment of an ordinance in the manner prescribed for the enactment of an ordinance generally. Pertinent provisions of the Planning Law, in effect when Ordinance 1018 was enacted, required a public hearing before the Planning Commission; notice of such a hearing; a resolution of the Planning Commission adopted by not less than two-thirds of the total voting members of the commission; and adoption of the resolution by the City Council

following a hearing upon notice by publication (Govt. Code §65803 [stats. 1953, ch. 1355, p. 2927]; Govt. Code §§65650 et seq. [stats. 1953, ch. 1355, pp. 2724 et seq.]).

The procedure prerequisite to the exercise of a police power "by a city organized under general law is subject to and controlled by general law." (Gen. see *City and County of S.F. v. Boyd*, 22 Cal.2d 685, 692; *Sullivan v. McKinley*, 14 Cal.2d 113, 117; *San Pedro etc. R. Co. v. Long Beach*, 172 Cal. 631, 634.) Thus the method prescribed by the general law for the enactment of a zoning ordinance, which is an exercise of the police power, is binding on a general law city and the enactment of such an ordinance by any other method is contrary to general law and ineffective. (*Hurst v. City of Burlingame*, 207 Cal. 134, 138; *Williams v. City of San Bruno*, 217 Cal.App.2d 480, 486.) Plaintiff is a general law city. Its contention Ordinance 1018 was not enacted in the exercise of its authority to adopt a zoning ordinance, and for this reason it was not required to comply with the enactment procedures prescribed by the statute governing the adoption of zoning ordinances, requires a determination whether Ordinance 1018 was enacted under a statute prescribing a different method of adoption. (See Govt. Code §§36934 et seq.) In 1965 plaintiff was authorized to regulate outdoor advertising either by enactment of zoning ordinances pursuant to the Planning Law then in effect (See fn. 1), or by an ordinance pursuant to Government Code section 38774. However, the nature of the regulation which might be adopted under either of these statutes was not identical. By the Planning Law plaintiff was authorized to adopt an ordinance regulating the location of structures and establishing building setback lines on any highway. (Former Govt. Code §65800 [stats. 1961, ch. 1111, p. 2836].) Fundamentally, the Planning Law was a statute authorizing the regulation of the use of land. The regulation of signboards, i.e., advertising structures, was within its provisions. (*County of Santa Barbara v. Purcell, Inc., supra*, 251 Cal.App.2d 169, 171, 172, 175.) By Government Code Section 38774, plaintiff was authorized to adopt an ordinance regulating "the exhibition, posting, or carrying of . . . pictures, signs or advertisements . . . on or upon buildings, fences, billboards, or other structures . . ."

This code section, as compared with the Planning Law, did not authorize a city to regulate the location of signboards as such; instead, it authorized only regulation of the exhibition and posting of advertisements on signboards; and even though it may have authorized the adoption of an ordinance proscribing the exhibition of advertisements on signboards in a particular location, it did not authorize adoption of an ordinance proscribing the erection and maintenance of such signboards. The Planning Law in 1965, insofar as it authorized a city to regulate the location of signboards not used for the exhibition of advertisements was exclusive; prescribed the manner of enacting an ordinance effecting such regulation; and, in substance, foreclosed the adoption of such an ordinance in any other manner as contrary to the general law, even though the ordinance was an exercise of the constitutionally conferred police power.

Plaintiff's reliance, in support of its position, on Business & Professions Code section 5288.7, added in 1967, (stats. 1967, ch. 1408, p. 3316) is misplaced. The 1967 statute conferred upon cities authority not theretofore conferred, to "enact ordinances, *including but not limited to land use or zoning ordinances*, imposing restrictions on advertising displays adjacent to any street, road or highway," which by definition included signboards, "equal to or greater than those imposed" by the Outdoor advertising Act (Italics ours); provided alternate procedures for the exercise of the police power to regulate signboards, i.e., by an ordinance enacted pursuant to the procedure prescribed by a zoning law or by an ordinance enacted pursuant to the procedure prescribed for the enactment of ordinances generally; and eliminated the conflict formerly caused by the enactment of an ordinance regulating signboards as an exercise of the constitutionally conferred police power when the ordinance was enacted pursuant to the procedure prescribed for the enactment of ordinances generally rather than pursuant to the procedure prescribed by the Planning Law.

Ordinance 1018 proscribes placing or maintaining an "advertising display" on property adjacent to a divided, arterial highway; and defines an "advertising display" as, among other things, "a structure of any kind or character erected or

maintained for outdoor advertising purposes on which any poster . . . or other advertisement of any kind whatsoever may be placed . . . "; regulates the use of the land on which signboards are placed or maintained by proscribing the placement or maintenance thereof on land adjacent to a highway; does not regulate the exhibition or posing of advertisements on such signboards; and is an ordinance which, on June 23, 1965, could have been enacted only under and in compliance with the procedure prescribed by the Planning Law.

Demonstrative of the difference between an ordinance authorized by the Planning Law and an ordinance authorized by Government Code section 38774, is the situation in the case at bench where, on the date of the judgment, the structure ordered removed was not being used for advertising purposes; no advertisements were exhibited or posted thereon; it was a blank signboard painted white; and could have been used for purposes permitted by the ordinance, which exempts from its provisions advertising structures which are used exclusively to advertise for sale or lease the property on which the structure is located, to designate the name of the owner or occupant of the premises, to identify the premises and to advertise the business conducted, goods manufactured or produced, or the services rendered on the premises. (Escondido Munic. Code §§9041, 9043; gen. see *National Advertising Co. v. County of Monterey*, 211 Cal.App. 2d 375, 382.)

The foregoing conclusions are determinative of this appeal, and we need not consider other contentions by defendants.

The judgment is reversed.

COUGHLIN (J.*)

WE CONCUR:
BROWN (P.J.)
WHELAN (J.)

* Assigned by Chairman of Judicial Council.

APPENDIX C

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

CITY OF ESCONDIDO, a municipal corporation of the State of California, Plaintiff, -vs- HOLLANDIA DAIRY, et al., Defendants.	NO. 312192 MEMORANDUM DECIS'ON

The case proceeded to trial only as against defendants Desert Outdoor Advertising, Inc., Arthur H. Shipkey and Betty Shipkey. Judgment is given as prayed against all parties having filed disclaimers, without costs.

First, I will consider validity of the ordinance as to whether it is a proper exercise of police power. I find that it is. It does not violate the rule established in *Varney and Green vs. Williams*, 155 Cal.318. That case involved a blanket ordinance which precluded billboards in the entire area concerned. The ordinance with which we are here involved does not, and it can be likened to a reasonable zoning scheme as the same have been approved many times by the courts. Section 9041(e) of the ordinance would distinctly limit its application to areas designed in the fashion of Highway 395 as it passes through the city. This design is unique in character. The ordinance would also apply to freeways proper which are likewise unique. No attempt is made to forbid commercial advertising by billboard on a city-wide basis.

As to the facts controlling the instant case, I do not feel that such an ordinance need be casted as a zoning ordinance with its various trappings as to hearings, variances, etcetera. Section 5288.7 of the Business and Professions Code appears to authorize the adoption of such an ordinance through simple police power, and I can find nothing in the law which requires that zoning procedures be utilized in this particular type of case.

I must also consider whether the ordinance is valid, assuming, first, that only aesthetics effected its adoption. *Varney* held this to be insufficient as a basis. More recent cases seem to say that aesthetic considerations, when coupled with an additional public need, are sufficient to establish validity. See *Desert Outdoor Advertising, Inc. vs. County of San Bernardino*, 255 C.A.2d 765, and *County of Santa Barbara vs. Purcell, Inc.*, 251 C.A.2d 169. The trend of the cases seems toward holding for validity on the basis of aesthetics alone. I believe the Supreme Court has, in effect, reversed *Varney* on this point in *Higgins vs. City of Santa Monica*, 62 C.2d 24. The court there held an ordinance valid, stating inter alia, that promotion of public "comfort" is sufficient. I do not feel it is any longer the law that an additional factor must accompany aesthetics for this type of ordinance to be valid. Nevertheless, if the additional factor is necessary, the same can be inferred from the evidence in this case. The city, in adopting the ordinance, characterized signboards in such an area as a "nuisance". This carries with it the clear implication that the city's attractiveness to tourists, settlers and the like is enhanced by eliminating billboards from such an area. The Court has viewed the scene, and finds that the city has taken fairly extensive steps to beautify the roadway in keeping with its apparent objective.

Last, I must ascertain whether the amortization period of three years - - as to these particular defendants - - is reasonable. I find that it is. As to this inquiry, the defendants have the

burden of proving that the period is unreasonable. Defendants' witness Roniss admitted he was not an expert on the subject of amortization of billboards. Neither Mr. nor Mrs. Buxbom gave testimony as to this subject. The only evidence produced was the amortization scheme adopted for income tax purposes. Although the California Supreme Court in *National Advertising Co. vs. County of Monterey*, 1 Cal.3rd 875, referred to such a scheme in reaching its decision, I do not feel that the court adopted such as its test to be applied in all cases. At page 880, the court states:

> "With respect to the other 11 signs, not yet fully amortized, removal should await expiration of *a reasonable amortization period in order to permit plaintiff to recover their original cost.*" (Emphasis added.)

Recouping of original cost seems to be the key. This billboard was acquired as one of a package of sixty billboards in 1963. The cost of all sixty was $18,500. The evidence does not show this board to have been more valuable than the average board then acquired. Thus, the cost inferred is slightly over $300. In the three-year period, the evidence shows income from the sign in the sum of $921. From this, of course, should be subtracted the rent paid to defendant Shipkey and a percentage of defendant Desert's overhead. But defendants did not produce evidence on these subjects and the burden is theirs to do so. Consequently, I find that defendant Desert did recoup its cost and that as to the facts of this case, the three-year period is reasonable. Thus, it is ordered that defendants be enjoined from maintaining the billboard at U. S. 395 in Escondido. Plaintiff is awarded its costs. Defendants shall have a period of ninety days to remove the billboard.

DATED: JAN 5 1971

ROSCOE S. WILKEY
Judge of the Superior Court

APPENDIX D

APPENDIX D

ORDINANCE NO. 1018

AN ORDINANCE OF THE CITY OF ESCONDIDO AMENDING DIVISION 9, CHAPTER 90 OF THE ESCONDIDO MUNICIPAL CODE BY ADDING THERETO ARTICLE 904, ENTITLED "FREEWAY SIGN CONTROL," CONSISTING OF SECTIONS 9041 THROUGH 9050.

The City Council of the City of Escondido DOES HEREBY ORDAIN as follows:

SECTION 1. That Division 9, Chapter 90 of the Escondido Municipal Code is hereby amended by adding thereto Article 904, entitled "Freeway Sign Control," including Sections 9041 through 9050 to read as follows:

Article 904, FREEWAY SIGN CONTROL

Section 9041. Definitions. As used in this article, certain terms are defined as follows:

(a) ADVERTISING STRUCTURE. Refers to a structure of any kind or character erected or maintained for outdoor advertising purposes on which any poster, bill, printing, painting, or other advertisement of any kind whatsoever may be placed, including statuary.

(b) SIGN. Refers to any card, cloth, metal, painted or wooden sign of any character, placed for outdoor advertising purposes, on or in the ground, or any tree, wall, bush, rock, fence, building, structure, or thing, either publicly or privately owned, other than an advertising structure.

(c) Neither "Advertising Structure" or "Sign", as used in this article includes:

1. Official notices issued by a court or public body or officer.
2. Notices posted by any public officer in performance of a public duty, or by any person in giving legal notice.

3. Directional, warning, or information signs or structures required or authorized by law.

(d) ADVERTISING DISPLAY. Refers to advertising structures and to signs.

(e) "SIGN CONTROLLED FREEWAY". The term sign controlled freeway means a divided arterial highway for through traffic, with full or partial control of access, and which may or may not have grade separations at intersections.

(f) TO PLACE. The verb "to place" and any of its variants as applied to advertising displays includes the maintaining and the erecting, constructing, posting, painting, printing, tacking, nailing, glueing, stitching, carving, or otherwise fastening, affixing, or making visible, any advertising display on or to the ground, or any tree, bush, rock, fence, post, wall, building, structure, or thing.

SECTION 9042. Advertising Displays Adjacent to Sign Controlled Freeways. No advertising displays shall be *placed or maintained* on property adjacent to a sign controlled freeway as defined herein, if the advertising display is designed to be viewed primarily by persons traveling on such freeway.

SECTION 9043. Exempt Advertising Displays. The provision of Section 9042 shall not apply to any of the following listed advertising structures or signs which are used exclusively:

(a) To advertise the offering for sale or for lease of the property on which said advertising display is placed;

(b) To designate the name of the owner or occupant of the premises upon which said advertising display is placed or to identify such premises.

(c) To advertise the business conducted or goods manufactured or produced, or services rendered upon the property upon which said advertising display is placed.

SECTION 9044. Removal of Prohibited Displays. Any advertising structure or sign which is now, or hereafter

may be, in violation of the provisions of Section 9042 shall be removed within three (3) years from the effective date of this ordinance.

SECTION 9045. Prohibited Displays as Nuisances. All advertising displays which are placed or which exist in violation of the provisions of this article are public nuisances, and may be removed by any public employee after ten (10) days written notice posted on the structure or sign and a copy forwarded by mail to the display owner at his last known address.

SECTION 9046. Removal of Temporary Signs. Notwithstanding any other provision of this article the City Manager or any authorized employee may summarily and without notice remove and destroy any advertising display placed in violation of this article which, because of the materials of which it is constructed, or because of the nature of the copy thereon is temporary in nature.

SECTION 9047. Entry Upon Private Property. For the purposes of removing or destroying any advertising display placed in violation of the provisions of this chapter the City Manager or his authorized agent may enter upon private property without incurring any liability for trespass therefor.

SECTION 9048. Violations as Misdemeanors. Every person as principal, agent, or employee, violating any of the provisions of this article is guilty of a misdemeanor.

SECTION 9049. Remedies cumulative to this Article. The remedies provided in this Article for the removal of illegal advertising displays are cumulative and not exclusive of any other remedies provided by law.

SECTION 9050. Severability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is, for any reason, held to be invalid, or unconstitutional, by the decision of any court of competent jurisdiction, such decision shall not affect the remaining portions of this ordinance.

SECTION 2. The City Clerk shall certify to the passage of this ordinance and cause the same to be published once within fifteen days of its passage in the Escondido Daily Times-Advocate, a newspaper of general circulation printed and published in the City of Escondido.

PASSED, ADOPTED AND APPROVED by the City Council of the City of Escondido at a regular meeting held on the 23rd day of June, 1965, by the following vote, to wit:

AYES: Councilmen Harding, Roberts, Speers, Turrentine, Tustin.

NOES: Councilmen None

ABSENT: Councilmen None

APPROVED:
/s/ Lewis P. Tustin
LEWIS P. TUSTIN, Mayor of the
City of Escondido, California

ATTEST:
/s/ Lina M. Hill
LINA M. HILL, City Clerk of the
City of Escondido, California